Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-211

JAMES DALTON,

Petitioner

vs.

INDIANA REFRIGERATOR LINES, INC.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1975.

NO. ____

JAMES DALTON,

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vs.

INDIANA REFRIGERATOR LINES, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The Petitioner, James Dalton, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 12, 1975.

OPINIONS BELOW

The Opinion of the Court of Appeals is not reported and appears in the Appendix hereto. The Opinion by the District Court for the Middle District of Tennessee was not reported and also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on May 12, 1975. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether an indemnity provision in a trip-lease agreement, by which a supplier of equipment and driver agrees to indemnify an interstate motor vehicle carrier, is unenforceable as against public policy established by 49 U.S.C. §304(e) and 49 C.F.R. §1057.4(a)(4).

2. Whether such indemnity agreement is too vague and ambiguous to apply to the facts of this case.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Code, Title 28:

§304(e). Regulations governing use of vehicles owned by others.

"Subject to the provisions of Subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor vehicle carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation property--

(1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they

were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment."

Code of Federal Regulations, Title 49:

§1057.4(a). Augmenting equipment.

"Other than equipment exchanged between motor common carriers in interchange service as defined in §1057.5, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) Contract requirements. The contract, lease or other arrangement for the use of such equipment: . .

(4) Exclusive possession and responsibilities.
Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement. . ."

STATEMENT OF THE CASE

The facts in this case are essentially undisputed. James Dalton, the Petitioner, supplied equipment and a driver to Indiana Refrigerator Lines, Inc., the Respondent, a major common carrier regulated by the Interstate Commerce Commission. The parties executed a lease agreement for a single shipment. (Record, p. 21). The cargo was stolen by the driver en route (Record, p. 9) and Indiana brought suit to recover losses it had suffered under an indemnification provision in the lease agreement.

Dalton, on the date of the shipment in question, owned five tractor-trailer units in which he hauled agricultural commodities exempt from Interstate Commerce Commission Regulation. (Record, p. 94). On return trips, Dalton's drivers leased their equipment and themselves to common carriers regulated by the Interstate Commerce Commission in order to haul non-exempt cargo for a single trip under a common carriers' certificate of convenience. (Record, p. 118).

The lease which is the subject matter of this suit was executed on July 28, 1972, by James Elmore, a truck driver for Dalton, acting as agent for Dalton. Under the lease, Elmore was to haul non-exempt cargo consisting of pork loins from Illinois to Maryland. (Record, p. 21). The driver stole the

cargo while en route, driving under Indiana's Interstate Commerce Commission permit and signs. (Record, pp. 9, 124). The leased vehicle was recovered on August 4, 1972, and a part of the cargo was also located, thus reducing Indiana's loss. (Record, pp. 34, 59).

Indiana paid the shipper, Campbell Soup Company, on its bill of lading. (Record, p. 57). Indiana brought suit to recover the amount of its loss under the indemnity provision of the trip-lease agreement. This provision reads as follows:

> "Lessor and Lessee agree to abide by the rules and regulations of the Interstate Commerce Commission, including the Lessee's Assumption of full direction, control and responsibility for said equipment for the duration of this agreement. Nevertheless, as between the Lessor and Lessee, Lessor agrees to protect, defend, indemnify and hold harmless, the Lessee from any and all claims of whatever kind or nature that may arise under this agreement." (Record, p.22)

Indiana, after paying the shipper, brought suit against Dalton, a resident of Tennessee, in the District Court for the Middle District of Tennessee for Twenty-five thousand one-hundred thirty-six and 87/100 Dollars ($25,136.87). Indiana is a corporation organized under

the laws of the State of Indiana, with its principal place of business at Muncie, Indiana. The District Court dismissed Indiana's suit on June 19, 1974. The District Court found that Dalton was not negligent under the facts of the case. Thus there was no basis for indemnity at common law, absent and enforceable contract provision. The District Court then found the Indemnity Agreement in the parties' trip-lease agreement was unenforceable. (See p. 5a of Appendix hereto.)

The Order of Dismissal was reversed by the Sixth Circuit Court of Appeals on May 12, 1975. (See p. 1a of Appendix hereto.) A judgment against Dalton was entered by the District Court for the Middle District of Tennessee on July 18, 1975 in the amount of $25,436.87.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS BELOW UNDERMINDS THE POLICY OF THE REGULATIONS PROMULGATED BY THE INTERSTATE COMMERCE COMMISSION FOR THE LEASING OF EQUIPMENT BY AUTHORIZED CARRIERS.

A. <u>The Trip-Leasing Regulations</u>

The question involved in this case, whether the indemnity provision in the parties' trip-lease agreement is enforceable involves the interpretation and construction of Interstate Commerce Commission Regulation 207.4(a)(4), 49 C.F.R. 1057.4(a)(4), one of a series

of regulations promulgated in Lease and Interchange of Vehicles by Motor Carriers. Ex Parte No. MC-43, 52 M.C.C. 675 (1951). Under these regulations the Interstate Commerce Commission established rules governing the use of non-owned equipment by authorized motor carriers. The regulations were promulgated to protect the trucking industry from leasing and interchange practices which were detrimental to the maintenance of sound transportation services. Central to the regulatory scheme was Regulation 207.4(a)(4) which provided that whenever an authorized motor carrier shall lease unauthorized equipment, the lease agreement shall be in writing and,

> "shall provide for the exclusive possession, control and use of equipment for the complete assumption of responsibilities in respect thereto by the Lessee for the duration of said contract, lease or other arrangement. . ." 49 C.F.R. §1057.4(a)(4). (emphasis supplied)

It is the position of the Petitioner that the clear meaning of this provision is that the authorized motor carrier is required by the Interstate Commerce Commission to assume all of the burdens of transportation while the leased equipment is used under its permit, including the financial risks of loss for that equipment, driver, cargo and potential injury to third parties. The position of the Respondent and that of the

Court of Appeal below is that as long as the lease agreement recites the above-quoted language, there is no inconsistency in allowing the regulated carrier to provide for indemnification by the non-regulated supplier of the equipment.

B. The Policy Behind the Regulations-American Trucking Associations vs. United States

The decision of the Court below subverts the purpose for which the Interstate Commerce Commission leasing regulations were promulgated. These regulations were promulgated on May 8, 1951 after a three-year study. Ex Parte No. MC-43, 52 M.C.C. 675 (1951). The regulations were upheld by this Court in the case of American Trucking Associations vs. United States, 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337 (1952). In that case this Court found, in the face of an attack by a number of motor carriers and associations, that the regulations were valid and in the public interest. The practices of leasing and interchanges had led to abuses which "directly affect[ed] the regulatory scheme of the Act, the public interest in necessary service and economic stability of the industry, and

it is on these that the rules focus." (p. 304) This Court thus held that the Commission acted within its power in promulgating the rules and that there was "clear and adequate evidence of evils attendant on trip-leasing". (p. 310) The leasing of equipment gave rise to a number of problems which were found to be detrimental to the industry. Thus leasing and interchange practices permitted: (1) evasion of the limitations of certified authority, geographical and otherwise, (2) decreased impetus and opportunity for safety inspections to be made by the certified carriers, and (3) difficulties in determining responsibility for accidents. In addition, the leasing practice had an adverse effect on the economic stability of the industry. Rate regulation was obstructed as overhead costs were unequal between authorized carriers who leased vehicles and those that did not, the difference in overhead costs forcing companies which owned vehicles to revert to leasing practices in order to compete with those that did. Ibid. (pp. 304-306.)

The decision of the Court of Appeals below leaves the door open for the revitalization of the above-listed evil practices. If an authorized carrier need not be concerned with a risk of loss in the use of unauthorized equipment, there is no impetus to thoroughly inspect equipment for safety. Legal responsibility for

accidents once again is shifted away from the Interstate Commerce Commission regulated carriers, whose signs are placed upon the vehicle, to a party who may not be known to the injured party and who may not be adequately insured (authorized carriers are required by the Interstate Commerce Commission to carry full insurance. 49 U.S.C.A. § 315). Finally, the economic stability of the industry is affected as carriers using leased vehicles need not pay liability insurance on such vehicles, thereby decreasing overhead, providing such companies with an unfair advantage over authorized carriers using owned vehicles.

C. Subsequent Congressional Action.

The strong public interest behind the promulgation and enforcement of the statutes was reinforced in 1956 when Congress amended §304 of Title 49. S. 898, 70 Stat. 983. The amendment to §304(e) authorized the Interstate Commerce Commission to prescribe, with respect to the use by motor carriers of motor vehicles not owned by them, regulations, which:

> "may be reasonably necessary to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations as if they were the owner of such vehicles." (emphasis supplied)

The Congressional mandate thus now directs the Interstate Commerce Commission to require that the authorized carriers assume full control and responsibility for regulated interstate shipments. The carrier cannot delegate to another party its duties to bear costs resulting from interstate shipments without delegating a part of its duty and responsibility of full control. The duties of full control and costs bearing are inseparable under the Act and Regulations. Wear vs. Brada Miller Systems, Inc., Civil Docket No. 73-1773 (Seventh Circuit, May 6, 1974), Petition for cert. granted, 43 U.S.L.W. 3493 (No. 74-54).

Thus, the decision of the Court below in allowing an indemnity provision in a lease agreement which specifies that the motor carrier lessee must assume "full direction, control and responsibility" (Record, p. 22) for the leased equipment renders the regulatory provisions for the express assumption of exclusive control by the motor carrier a mere formality.

D. The Agricultural Exemption to the Trip-Leasing Regulations

The decision of the Court below also subverts a well-recognized exemption to 30-day leasing regulations which apply to haulers of agricultural commodities. 49 C.F.R. §1057.4(a)(3)(i). The Interstate Commerce Commission found on a subsequent study of its regulations that farmers frequently haul their own produce to markets and rely on trip-leasing from authorized carriers to make a small profit on their return trip. Lease and Interchange by Motor Carriers, Ex Parte No. MC-43, 64 M.C.C. 361 (1955),

68 M.C.C. 553 (1956). The Interstate Commerce Commission found that this single trip leasing practice would be beneficial to the agricultural industry and therefore exempted such haulers from the regulatory provisions that trip-leases with carriers must be at least thirty days in length as long as trip-leases between the authorized carriers and agricultural haulers were for a single trip only. Ibid. This exemption was codified in an amendment to §49 U.S.C. 304(f), passed by Congress in 1956, S. 898,. 70 Stat. 983. This exemption is in line with the general exemption of agricultural commodities from Interstate Commerce Commission regulation. 49 U.S.C.§303(b)(6).

Dalton's operation complied with the exemption for agricultural commodities and his drivers frequently operated under single trip-lease agreements. The decision of the Court below, which has the effect of requiring small exempt agricultural haulers such as Dalton to bear liability insurance costs on regulated trip-lease shipments presents an undue burden on these agricultural haulers. Such haulers would be required under this decision to insure themselves for twice as many shipments and to insure themselves for trip-lease shipments of cargo of uncertain value. This increased cost would obviously have an adverse effect on these haulers and, indirectly, the agricultural industry itself. Thus, the decision of the Court below undermines a valid exemption promulgated to advance the agricultural industry.

2. THE DECISION OF THE COURT OF APPEALS BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AND STATE COURTS AS TO THE QUESTION OF WHETHER SUCH INDEMNITY PROVISIONS ARE UNENFORCEABLE DUE TO THEIR VIOLATION OF THE PUBLIC POLICY ESTABLISHED BY THE INTERSTATE COMMISSION.

A. The Fifth and Sixth Circuits Hold the Indemnity Provisions Enforceable

The decision of the Court below follows the recently decided case of Jones Truck Lines, Inc. vs. Ryder Truck Lines, 507 F.2d 100 (6th Cir., 1974) pet. for cert. filed 43 U.S.L.W. 3479 (Feb. 6, 1975) (No. 74-973), in which the Sixth Circuit held valid an indemnification clause which required a lessor of equipment to indemnify an Interstate Commerce Commission regulated carrier from losses occurring during the performance of the lease agreement. See also Indiana Insurance Co. vs. Parr Trucking Service, Inc., 510 F.2d 490 (6th Cir.,1975). This case follows an earlier decision by the Fifth Circuit. Allstate Insurance Company vs. Alterman Transport Lines, 465 F.2d 710 (5th Cir., 1972). (The Jones Truck Lines decision was not reported at the time the parties to this case argued before the Sixth Circuit.)

In the Allstate case, the Fifth Circuit upheld an indemnity clause in a lease between two regulated carriers. Whether the Fifth Circuit would follow its decision in Allstate if faced with the same issues is now subject to question. In a later case, Simmons vs. King, 478 F.2d 857 (5th Cir. 1973) that Circuit emphasized the public policy of the Interstate Commerce Commission regulations in requiring the carrier-lessee to assume full and complete responsibility for the

negligence of a driver while operating under a trip-lease agreement. Although the lease agreement in Simmons did not involve an indemnification provision, the Court did reaffirm the strong public policy behind the regulations, thereby throwing into question the Allstate decision which had the effect of weakening the regulations and the public policy behind them.

B. The Seventh Circuit Holds the Indemnity Provisions Unenforceable

However, there is a clear split of authority between the Court of Appeals on this issue. In a decision which adopts the position the Petitioner here asserts, the Seventh Circuit, in the case of Alford vs. Major, 470 F.2d 132 (7th Cir. 1972) declared a similar indemnity provision unenforceable. In that case the carrier-lessee and the lessor both were sued by a third party for negligence of the driver, and the carrier-lessee then filed a cross-claim against the lessor for indemnification. Quoting from the American Trucking Associations case, the Seventh Circuit found,

> "The purpose of the regulations thus was 'to protect the industry from practices detrimental to the maintenance of sound transportation services. . .' and to assure safety of operation for vehicles and drivers." (p. 34).

Further, the Court found that the intent of the regulation was "to make sure that licensed carriers would be responsible in fact as well as in law, for the maintenance of leased equipment and the supervision of borrowed drivers." (p.135). Thus, the Seventh Circuit held that the purpose and intent of regulations would be defeated by an indemnification clause which would permit the carrier-lessee to "circumvent the regulation's requirement that these carriers exert actual control over the leased equipment and all drivers". (p.135). This case was upheld recently by the Seventh Circuit in an unreported case. Wear vs. Brada Miller Systems, Inc., Civil Docket No. 73-1773. (7th Cir. May 6, 1974) pet. for cert. granted, 43 U.S.L.W. 3493 (No. 74-54).

C. The Fourth Circuit Holds With the Fifth and Sixth Circuits

On the other hand, in a recent decision, the Fourth Circuit followed Allstate and attempted to distinguish Alford. Carolina Freight Carriers Corp. vs. Pitt County, 492 F.2d 243 (4th Cir. 1973). pet. for cert. filed 43 U.S.L.W. 3067 (August 13, 1974) No. 73-1750). The Fourth Circuit found that Alford was not persuasive on the grounds that the carrier-lessee in Alford violated other provisions of the ICC Regulations in addition to providing for indemnity. The Fifth Circuit held that two "freely contracting parties" may determine between themselves which party will ultimately bear the costs and damages done to a third person.

The attempt to distinguish Alford on its facts is unsound. The Seventh Circuit recently had occasion to address itself again to the issue of whether an indemnity provision in a trip-lease agreement is unenforceable, and reaffirmed its decision in Alford. Wear vs. Brada Miller Systems, Inc., Civil Docket No. 73-1773 (7th Cir. May 6, 1974), pet. for cert. granted, 43 U.S.L.W. 3493 (No. 74-54). The Seventh Circuit rejected the factual distinction adopted by the cases following Allstate,

> "We do not agree that Alford can be distinguished from [Allstate]. The Fifth Circuit determined that 49 C.F.R. §1057.4(a)(4) did not prohibit the parties from determining between themselves which parties would bear the costs. The district court in Alford expressly rejected this interpretation. . .and our affirmance specifically recognized that the indemnity clause itself circumvents the regulations." (p.7).

Thus, the Seventh Circuit held in Wear, that under the statute and regulations, the duty of bearing costs for damages occurring in transit is inseparable from the carrier's duty of responsibility and control,

> "[The carrier-lessees] argument proceeds from the premise that control and cost bearing are not related. We disagree. In Alford we interpreted the regulations as requiring the party who had the

duty of responsibility and control under 49 U.S.C. §304(e) to internalize the cost of any breach of this duty. This forces the lessee to take costs into account in the exercise of such duty." (p.7).

D. Nebraska and New Jersey State Courts Hold With the Seventh Circuits

Two State Supreme Courts, Nebraska and New Jersey, have recently faced the question presented here, whether an indemnification clause in a trip-lease agreement is enforceable. Both State Courts noted the split of authority between Alford and Allstate and followed the holding of Alford. Thus, the Nebraska Supreme Court in the case of Denver Midwest Motor Freight, Inc. vs. Busboom Truck Lines, Inc., 190 Neb. 231 207 N.W. 2d 368 (1973) held,

> "[A]n indemnification clause in a trip lease of operating equipment by a licensed motor carrier, subject to ICC Regulations, which obligates the lessor to reimburse the lessee for any payment made on account of any accident, claim or suit arising out of the operation of the equipment during the term of the lease is unenforceable as against public policy." (p.371)

More recently, in the case of Gordon Leasing Co. vs. Navajo Freight Lines, 130 N.J. Super. 290,326 A.2d 114 (1974), the Supreme Court of New Jersey held an indemnification agreement in a lease between two carriers to be unenforceable.

> "The enforcement of the indemnity provision as sought by the lessee could result in adversely affecting the safety of the operation of the equipment, would permit circumvention of the requirements of the ICC pertaining to truck leasing, and inject uncertainties in the responsibilities of lessor and lessee with respect to the use of leased equipment. Public policy was better served by mandating compliance with the regulations." (p. 118)

E. Conclusions

Thus, there are at least seven cases decided on the issue presented in the instant case. Four, Alford, Wear, Denver Midwest Motor Freight, and Gordon Leasing Co., hold that an indemnification provision in a trip-lease agreement is unenforceable (in addition, it is appropriate to remember that the District Court in this case held the indemnity clause unenforceable). Three cases, Allstate, Carolina Freight Carriers and Jones Truck Lines, Inc., take the opposite position. Of these cases above cited, the following cases are pending before this Court: Wear (Certiorari granted), Carolina Freight Carriers (Certiorari filed) and Jones Truck Lines, Inc. (Certiorari filed). A decision on any of these cases which is dispositive of the principal issues involved in this case should therefore be applicable to this case.

Although the instant case involves a theft by a driver supplied by the lessor, the issue presented in the instant case is the same as the above-cited cases, which all involve suits arising from the negligence of the drivers supplied by the lessors. The Respondent pleaded a "negligent entrustment" theory before the trial court, i.e. that Dalton had negligently failed to investigate his driver before hiring him. However, the findings of fact by the District Court that "Indiana has failed to show any discoverable aspect of Elmore's past to cast doubt on his trustworthiness" (See p. 11a of Appendix hereto) precluded this issue. In the absence of the lessor's negligence, there is no distinction that the above-cited cases involve driver negligence as opposed to driver dishonesty.

The issues presented in this case are of paramount importance to a large national industry. The split of authority of the cases results in an uncertainty within the industry. Both authorized carriers who utilize leasing practices and the suppliers of equipment cannot ascertain which party is to bear the risk of loss during shipment. The result of the present situation is economic waste: Both parties must insure themselves for liability under a trip-lease agreement. The only solution to this uncertainty is for this Court to grant this Petition for a Writ of Certiorari and decide the issues in this case as well as the three other cases involving this issue in which certiorari is presently pending.

F. Other Issues Involved

Finally, the correctness of the proceeding below, even assuming that the indemnity provisions are enforceable, is open to serious question. The indemnity provision in the trip-lease agreement in this case is extremely short and vague,

> "Nevertheless, as between the Lessor and Lessee, Lessor agrees to protect, defend, indemnify and hold harmless the Lessee from any and all claims of whatever kind or nature that may arise under this agreement." (Record,p. 22).

The driver of the leased vehicle is Indiana's "statutory employee" under the aforementioned Interstate Commerce Commission Regulations. Simmons vs. King, 478 F.2d, 857 (5th Cir. 1973). To the extent that the indemnity provision covers the negligence or intentional wrongdoing of its own employees, the indemnity provision must be strictly interpreted and narrowly applied under State law. Thus, where the indemnitee claims indemnity against his own negligence, the courts will require "clear and unambiguous language". Eades vs. Union Railway Co., 396 F.2d 798 (6th Cir. 1968); Brogden vs. Southern Railway Co., 284 F.2d 220 (E.D.Tenn. 1967).

Properly interpreted, the second sentence of the indemnity provision, in referring to liability arising out of "this agreement" is limited to liability under the lease agreement. The word "this agreement" in the indemnity provision should not be extended to cover liabilities arising out of the shipping agreement, i.e.

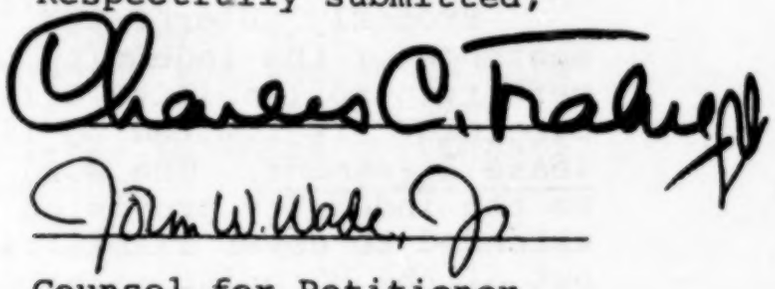
the bill of lading, which is an agreement completely extraneous to the lease agreement and of course is not executed by the lessor. Yet the decision of the Court below imposes on the Petitioner liability for loss on the Respondent's shipping contract. Finally, it is important to note that the lease agreement is a standard form contract prepared by the Respondent without negotiations with Dalton. Thus the words of the contract should be interpreted narrowly against the Respondent. Restatement, Contracts §236(d).

Thus, this Court need not adopt the broad construction of the indemnity provision found by the Court of Appeals below. This case could indeed end with the decision that the indemnification provision in the trip-lease agreement is not judicially construed to extend to the extreme position which the Sixth Circuit has adopted.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,



Counsel for Petitioner

August 1, 1975

APPENDICES

No. 74-2197

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Indiana Refrigerator Lines, Inc.,	)	
Plaintiff-Appellant,	)	Appeal from the United States District Court for the Middle District of Tennessee.
v.	)	
James Dalton,	)	
Defendant-Appellee.	)	

Decided and Filed May 12, 1975.

Before: Phillips, Chief Judge, Peck, and McCree, Circuit Judges.

Per Curiam. This is an appeal from the dismissal of a complaint in an action for indemnification brought by Indiana Refrigerator Lines, Inc. against Dalton for damages arising from a Dalton employee's conversion of cargo from a truck that Dalton had leased to Indiana. In its complaint, Indiana alleged that Dalton was required to indemnify it for the damages it had paid to the shipper of the lost cargo because of an indemnity clause in the trip-lease agreement between them:

"Lessor and Lessee agree to abide by the rules and regulations of the Interstate Commerce Commission, including Lessee's Assumption of full direction, control, and responsibility for said equipment for the duration of this agreement. Nevertheless, as between Lessor and Lessee, Lessor agrees to protect, defend, indemnify and hold harmless, the Lessee from any and all claims of whatever kind or nature that may arise under this agreement."

The district court, relying on the language of 49 C.F.R. §1057.4(a)(4)[1] dismissed Indiana's complaint on the ground that Indiana, as an I.C.C. certified carrier, is required to assume ultimate responsibility for any damages arising from the execution of a trip-lease agreement with an exempt carrier, and that to permit an action for indemnification against a lessor who is exempt from I.C.C. regulation would undermine the public policy expressed in 49 C.F.R. §1057.4(a)(4). In making this determination, the district court expressly declined to follow the

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[1]In accordance with the authority given to it by Congress in 49 U.S.C. §304(e), the Interstate Commerce Commission promulgated 49 C.F.R. §1057.4(a)(4) that required, inter alia, that trip lease agreements "shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement. . . ."

decision in Allstate Insurance Co. v. Alterman Transport Lines, Inc., 465 F.2d 710 (5th Cir. 1972) and followed the decisions in Alford V. Major, 470, F.2d 132 (7th Cir. 1972) and in Carolina Freight Carriers Corp. v. Pitt County Transportation Co., 358 F.Supp. 1177 (E.D. Va. 1973), rev'd 492 F.2d 243 (4th Cir. 1974),petition for certiorari pending, No. 73-1750, 43 U.S.L.W. 3041, (August 13, 1974).

Since the district court's decision, the Supreme Court has granted certiorari in Wear v. Brada Miller Freight Systems, Inc., No. 74-54, 43 U.S.L.W. 3493 (March 18, 1975), a case in which the Seventh Circuit, in an unreported order, followed its earlier decision in Alford and held invalid an indemnification clause similar to the one at issue in this case. More importantly, the district court in the appeal before us did not have available to it at the time of its decision our recent opinions in Jones Truck Lines, Inc. v. Ryder Truck Lines, No. 74-1443 (December 13, 1974), petition for certiorari pending, No. 74-973, 43 U.S.L.W. 3479 (March 4, 1975) and Indiana Insurance Co. v. Parr Trucking Service, Inc., No. 74-1652 (February 11, 1975) in which we upheld the validity of indemnification clauses in trip-lease agreements requiring a carrier who is exempt from I.C.C. regulation to indemnify an I.C.C. regulated carrier for losses occurring during the performance of the lease agreement. On the authority of these decisions, we reverse the determination of the district court and remand for further proceedings.

In making this disposition, we observe that there is no doubt that Indiana was required by I.C.C. regulations to pay the shipper for the loss of cargo. Indiana has done this. Accordingly, the only question before us is whether the policy expressed in the regulatory requirement prohibits an action for indemnification against the lessor of the vehicle when the driver furnished by the lessor converts the cargo for his own purposes. We agree with appellant that the primary goals of the I.C.C. regulation imposing responsibility on carriers are: (1) to prevent I.C.C. carriers from avoiding safety standards imposed by the I.C.C. by the simple practice of leasing equipment from non-regulated carriers; (2) to promote highway safety by insuring that drivers furnished by exempt carriers as part of the lease agreement do not violate safety regulations in the operation of the leased equipment; and (3) to provide shippers and other members of the public with financially responsible carriers. We hold that these goals are not undermined by enforcing the indemnification provision in this case. Indiana has already paid the shipper for the lost cargo; the leased equipment was given a safety inspection before the trip; and the driver furnished by the lessor operated the leased equipment in a safe manner.

Reversed and remanded for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

INDIANA REFRIGERATOR LINES, INC.	:	
v.	:	No. 74-5-NE-CV
JAMES DALTON	:	

M E M O R A N D U M

The decision in this case is whether a trip lease indemnification clause may be enforced against the lessor of a truck and driver to recover damages incurred by the motor carrier lessee as a result of the driver's theft of the cargo. The court has diversity of citizenship jurisdiction of this matter under 28 U.S.C. §1322(a), and, since there is presented the interpretation of a federal regulation, jurisdiction is also proper under 28 U.S.C. §1441(b).

The essential facts are not in dispute. Indiana Refrigerator Lines, Inc. (Indiana), a certified common carrier, leased a tractor-trailer truck and driver from James Dalton, an exempt carrier of agricultural products, under a trip lease arrangement whereby Dalton contracted to transport a shipment of meat from East Peoria, Illinois, to Salisbury, Maryland. The lease was entered into by one of Dalton's drivers, a Charles Elmore, who stopped at Indiana's Illinois terminal, signed the lease as Dalton's authorized agent, and picked up the cargo. Instead of going to Maryland as instructed, Elmore stole the shipment of meat which resulted in Indiana's having to pay the cargo's consignor $32,399.64.

Indiana now seeks to recover its loss from Dalton under the following clause in their lease:

> "Lessor and Lessee agree to abide by the rules and regulations of the Interstate Commerce Commission, including Lessee's Assumption of full direction, control, and responsibility for said equipment for the duration of this agreement. Nevertheless, as between Lessor and Lessee, Lessor agrees to protect, defend, indemnify and hold harmless, the Lessee from any and all claims of whatever kind or nature that may arise under this agreement."

Dalton asserts that this indemnification clause is against public policy and is therefore unenforceable. The court has concluded that Dalton's position is correct.

As stipulated by the parties, the lease between Indiana and Dalton is subject to ICC rules and regulations governing augmentation of an authorized carrier's vehicles by those of an exempt carrier. Congress, in 49 U.S.C. §304(e), authorized the Commission to make:

> "such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being [leased] the motor carriers [lessees] will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable laws and regulations,

> as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment. ***"

The regulations subsequently enacted by the ICC require, in part, that trip leases:

> "shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement. . . ."

49 C.F.R. §1057.4(a)(4)

Indiana does not contest its duty to assume complete control of and responsibility for lease equipment nor that trip lease provisions whereby a regulated carrier undertakes to avoid liability to injured third persons would circumvent statutory and regulatory policy and thus be unenforceable. Rather, Indiana takes the position that, at least in the instant circumstances, ICC regulations do not prohibit a lessor and a lessee from deciding between themselves which party will ultimately bear the cost of damages to a third party. In essence, Indiana argues that the lease with Dalton complied with ICC regulations, that Indiana assumed control of the equipment and conducted inspections to insure its highway safety, and that Dalton's having to bear the cost of its employee-driver's dishonesty in no way offends public policy or is proscribed by ICC regulations.

The effect of indemnity clauses such as the one involved here has been considered in several recent cases. Two in particular are cited by the parties herein in support of their respective positions.

In Allstate Insurance Co. v. Alterman Transport Lines, Inc., 465 F.2d 710 (5th Cir. 1972), the court held that a trip lease clause providing for indemnity by the lessor was consistent with ICC regulations and could therefore be a matter of negotiation between contracting trucking companies. Alford v. Major, 470 F.2d 132 (7th Cir. 1972), on the other hand, reached an opposite conclusion in holding that a trip lease indemnification clause obligating the lessor to indemnify the lessee for damages to cargo or third persons resulting from negligence of the lessor or his driver was unenforceable as against public policy. The rationale of Alford, and relied upon by defendant here, was that the indemnity clause would enable the lessee to circumvent the intent of ICC regulations, which was ". . .to make sure that licensed carriers would be responsible in fact, as well as in law, for the maintenance of leased equipment and the supervision of borrowed drivers." Id. at 135.

The Alford decision on this issue has been adopted elsewhere, Carolina Freight Carriers Corp. v. Pitt County Transp. Co., 358 F.Supp. 1177 (E.D. Va. 1973); Denver Midwest M.Frgt., Inc. v. Busboom Truck, Inc. 207 N.W.2d 368 (1973), and the general view that authorized carriers must expect to bear the ultimate responsibility under trip lease arrangements may be found in numerous other cases. See e.g., Simmons v. King, 478 F.2d

857 (5th Cir. 1973); Mellon National Bank & Trust Co. v. Sophie Lines, Inc., 280 F.2d 473 (3rd Cir. 1961); Cosmopolitan Mutual Insurance Company v. White, 336 F.Supp. 92 (D.Del. 1972).

It is relevant to note that the above authorities involve, for the most part, situations in which lessee indemnification was sought to recover damages paid by the lessee to third persons for personal injury or death resulting from a borrowed driver's negligence. In such cases, public policy considerations are drawn more sharply in focus than in the instant case, perhaps, since a principal goal behind ICC regulations is highway safety. Indiana argues that the cargo theft by Dalton's driver in no way involves highway safety and therefore the indemnity sought to be enforced does not serve to subvert the public policy underlying ICC regulations, and further, that this is particularly so when, as it has here, the lessee carrier has satisfied the shipper's claim for damages.

However, in the court's opinion the effect of ICC regulations and the public interests sought to be served thereby are far more extensive than what has been proposed by plaintiff in this case. From the regulations themselves and the manner in which the regulatins have been interpreted in the cases cited supra, the court concludes that

Congress and the ICC intended for authorized carriers to bear the ultimate responsibility for personal injury and cargo loss[1] which occur during the course of trip lease transportation service. The reasons for strict regulation of the trip lease device have been frequently enunciated, and of paramount importance in the regulatory scheme has been:

> "'. . .to protect the industry from practices detrimental to the maintenance of sound transportation services. . .' and to assure safety of operation for vehicles and drivers. See American Trucking Associations v. United States, 344 U.S. 298, 310, 73 S.Ct. 307, 314, 97 L.Ed. 337 (1952)." Alford v. Major, supra, at 134.

To promote the goals of highway safety and overall health of the national transportation system, authorized carriers must assume complete control of and responsibility for not only leased equipment but also borrowed drivers, who may be considered statutory employees of the carrier while engaged in performing the carrier's activities. Simmons v. King, supra, at 867;

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[1]The ICC's intent to regulate not only trucks on the highway but also matters relating to cargo and the financial responsibility of regulated carriers is reflected in 49 C.F.R. §1043 wherein the ICC reserves the right to define and approve acceptable indemnity arrangements between carriers and insurance companies.

Cosmopolitan Mutual Insurance Company v. White, supra, at 98. Under this pervasive regulatory policy the burden of driver dishonesty as well as driver negligence falls upon the regulated carrier; in either situation attempts to shift this burden to exempt carrier lessors acts to dilute what this court finds to be the goal of ICC regulation in this area--the certified carrier's complete control, supervision, and responsibility over truck and driver during the course of trip lease shipments. "If indemnity clauses in these circumstances are unenforceable, uncertainty is removed, statutory and regulatory provisions are fully enforced, and public policy is best served." Denver Midwest M.Frgt., Inc. v. Busboom Truck, Inc., supra, at 371.

It may be true as suggested by Indiana that this result will severely affect the willingness of authorized carriers to make use of trip leased vehicles. But if indemnification as sought here is consistent with the public's interest in transportation services, that determination rests with Congress or the ICC.

Indiana further seeks recovery on the ground that Dalton was negligent in failing to conduct a background investigation into the honesty of its driver, Charles Elmore. However, assuming Dalton's duty to make such inquiry[2], Indiana has failed

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[2]Given Elmore's status as a statutory employee of Indiana, the extent of this obligation is open to question.

to show any discoverable aspect of Elmore's past to cast doubt on his trustworthiness. Indiana is therefore not entitled to recover on a theory of negligence since it has shown no proximate relationship between Dalton's omission and the resulting theft.

For the reasons set forth above, the action against James Dalton must be dismissed. An appropriate order shall issue.

UNITED STATES DISTRICT JUDGE